In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN P. CALANDRA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOR SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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We deem it appropriate to make a short reply to respondent's brief. We here focus on the argument that, whatever the propriety of allowing the grand jury to consider the physical records seized from him, respondent cannot be required to testify before the grand jury because the information which prompted his subpoena and which will provide a basis for questioning him derived from the allegedly unlawful search and seizure.[1] Subpoenaing and questioning him on the basis of such information, the argument runs, constitute additional Fourth Amendment invasions distinct from the initial invasion of privacy.

1. This novel proposition misconceives the function of the Fourth Amendment. Its purpose is not to make relevant evidence inaccessible. The Amendment in no

[1] As we pointed out in our main brief (Br. 8), while we believe the search and seizure were valid, we do not ask this Court to review this issue.

way qualifies the rule that the grand jury is entitled to every man's evidence. Insofar as it bears on criminal investigations, the Fourth Amendment is primarily concerned with means: it assures that relevant evidence shall not be obtained in ways that unreasonably intrude on privacy. But—with perhaps very rare exceptions, cf. *Griswold* v. *Connecticut,* 381 U.S. 479, 484; *Warden* v. *Hayden,* 387 U.S. 294, 303-the Amendment itself excludes no document or information merely because of its "private" character. See *Katz* v. *United States,* 389 U.S. 347, 350-351.

Normally, the Fourth Amendment is not implicated when evidence is sought to be obtained by subpoena. To be sure, a demand for records may be so wide-ranging as to impose an undue burden—absent special justification—and the Court has interposed the Fourth Amendment in that situation. *Hale* v. *Henkel,* 201 U.S. 43. In the circumstances of the present case, however, there would have been no arguable Fourth Amendment objection to subpoenaing the limited records in suit—whatever the violation involved in obtaining them in the search of respondent's business premises. Nor is there now any basis for invoking the Fourth Amendment as a bar to calling respondent as a witness before the grand jury.

It is no sound objection that questioning respondent will breach his privacy and compel him to make disclosure of matters he would rather keep to himself. That is simply a necessary sacrifice which every citizen is required to make for the sake of justice. Except only for specially privileged matter, the law compels every man to contribute whatever relevant information he may have, however embarrassing or unpleasant the duty. See *United States* v. *Dionisio,* 410 U.S. 1, 9; *Branzburg* v. *Hayes,* 408 U.S. 665, 688.

Whatever privileges may excuse a witness from responding to particular questions in a grand jury proceeding, the Fourth Amendment itself confers no immunity from compulsory testimony. In *Katz* v. *United States, supra,* the Court held that surreptitious eavesdropping on unguarded private conversations may violate the constitutional rule. But it has never been suggested that *compelled testimony* is in any way regulated by the Fourth Amendment.[2] Else, "probable cause" would be a prerequisite to calling a witness, or requiring a response, in every proceeding, whether administrative, legislative, or judicial, civil or criminal. And that, of course, is not the law. See *United States* v. *Dionisio, supra,* 410 U.S. at 9-13; *Branzburg* v. *Hayes, supra,* 408 U.S. at 701-706; *United States* v. *Powell,* 379 U.S. 48, 57, and cases there cited.

2. This disposes of respondent's claim that requiring him to answer grand jury questions would constitute a fresh invasion of his Fourth Amendment rights. Although respondent is at pains to avoid it (Br. 9, 10), the real threshold issue in this case is whether the *exclusionary rule* fashioned to deter violations of the Amendment should be extended to bar grand jury questions based on illegally obtained evidence. We have fully dealt with this matter in our original brief and do not repeat that discussion here. It may be appropriate, however, to add a word about *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, on which respondent so heavily relies.

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[2] Arguably, an exception might be made for compelled testimony that is sought as a *substitute* for written records, the production of which could be resisted under the Fourth Amendment. See Mr. Justice Douglas, concurring, in *Gelbard* v. *United States,* 408 U.S. 41, 64 n. 1. But that is not our situation: we are here addressing respondent's complaint that he will be required to reveal information *beyond* what the seized records show.

The first thing to be said about *Silverthorne* is that it had nothing whatever to do with *new* evidence sought to be elicited from the victim of a Fourth Amendment violation. The situation there was that of two indicted individuals, whose papers had been seized "without a shadow of authority" and ordered returned, who were now objecting to the government's attempt to recapture the very same papers by issuing a subpoena in the name of the grand jury. Accordingly, that decision does not support respondent's objection to testifying to matters not immediately disclosed by the the seized records.

Nor does *Silverthorne* govern our case even with respect to the records seized in the allegedly illegal search. For here there are two critical differences: as we stress in our main brief, no Fourth Amendment violation had been established before the grand jury proceedings were under way; and respondent, unlike the Silverthornes, has been offered immunity and therefore cannot be legally injured by the grand jury's consideration of his papers.[3]

We recognize, of course, that some of the sweeping language of the *Silverthorne* opinion, especially the epigramatic conclusion that illegally obtained evidence "shall not be used at all," can be stretched further. But that *dictum*—unnecessary to the decision—has not,

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[3] Contrary to respondent's assertion (Br. 17-18), *Hale* v. *Henkel*, *supra*, does not foreclose our argument that a grant of immunity deprives a grand jury witness of standing to invoke the exclusionary rule. First, that case involved no application of the exclusionary rule, but the quite distinct claim that compliance with the subpoena would itself invade Fourth Amendment rights. Moreover, that claim was in fact rejected as to the immunized individual witness. 201 U.S. at 73-77.

in fact, been followed by this Court in applying the exclusionary rule. Respondent concedes as much (Br. 10, n. 9). We submit there is no occasion here to apply *Silverthorne* beyond its own facts.

Finally, if it were necessary to do so—we think not—we would urge that *Silverthorne* was wrongly decided and that the force of the precedent has been eroded by subsequent decisions. Indeed, except for the earlier illegality, there does not seem to have been any Fourth Amendment obstacle to the subpoena for the Silverthorne papers and, as our main brief demonstrates, no subsequent ruling of this Court suggests that—absent a special statutory provision—the exclusionary rule applies to grand jury proceedings. See Mr. Justice White, concurring, in *Gelbard* v. *United States,* 408 U.S. 41, 70. In these circumstances, it is difficult to justify the *Silverthorne* result. Nevertheless, should the Court determine to leave the *Silverthorne* holding unimpaired, it would be inappropriate, we think, to extend its logic to dissimilar cases.

For the reasons stated here and in our main brief, the judgment below should be reversed.

Respectfully submitted.

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